No. 99-1408

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CLERK

In The

Supreme Court of the United States

GAIL ATWATER, Individually, and MICHAEL HAAS as next friend of ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK and FRANK MILLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER'S PETITION FOR DISCRETIONARY REVIEW

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Texas Criminal Defense Lawyers Association respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused "at this time."

The Texas Criminal Defense Lawyers Association is an organization of over 2000 attorneys across Texas who represent citizens accused of crimes in both state and federal courts. TCDLA is the Texas affiliate of the National Association of Criminal Defense Lawyers. As such, TCDLA takes an active interest in important issues before this Court.

The instant case is brought under 42 U.S.C. § 1983 and therefore is a civil case. The issue it raises, however, could have important implications in constitutional criminal procedure. TCDLA's amicus brief more fully addresses some of these criminal procedure implications.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE**

The Texas Criminal Defense Lawyers Association (TCDLA) is a Texas nonprofit corporation with a membership of more than 2000 attorneys covering the State of Texas. TCDLA was organized almost three decades ago with the stated purposes of protecting and insuring by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases, to resist efforts to curtail such rights, to encourage cooperation between lawyers engaged in the defense of citizens accused of crimes through educational programs and other assistance, and through such cooperation, education and assistance to promote justice and the common good.

STATEMENT

Amicus adopts petitioner's statement of the case.

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* Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court has before it an opportunity to review the reasonableness under the Fourth and Fourteenth Amendments of custodial arrests for minor traffic offenses that do not rise to the level of breaches of the peace. Through the evolution of the law surrounding searches incident to arrest, we have reached a point where a police officer may pull a person over for a traffic violation and immediately conduct a full search of his automobile. The reason for this is that, because the officer has the discretionary power to arrest for the traffic violation, he has automatic "probable cause to arrest" for purposes of the search incident to arrest doctrine. As explained below, this is creating documented abuses, particularly against racial minorities.

It is clear that through this evolution in the law, the doctrine of cases such as *Terry v. Ohio*, 392 U.S. 1 (1968) and *Michigan v. Long*, 463 U.S. 1032 (1983) has been rendered inapplicable to the vast majority of traffic stops. The solution is to hold that custodial arrests on minor traffic offenses not amounting to breaches of the peace are unreasonable seizures under the Fourth Amendment. This will remove the "automatic probable cause to arrest" that accompanies these traffic stops and re-establish the traditional requirements of reasonable suspicion and probable cause enunciated in *Terry* and its progeny.

This is clearly an important question of constitutional law and TCDLA joins Petitioner in requesting that this Court grant her Petition.

ARGUMENT

CUSTODIAL ARRESTS FOR MINOR TRAFFIC OFFENSES NOT RISING TO BREACHES OF THE PEACE ARE UNREASONABLE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS

All too often today a traffic stop becomes a nightmare for some hapless driver who fails to use a turn signal, fails to wear his seatbelt or dim his high beams, or commits any number of other minor traffic offenses. That is because for many drivers, the stop will not result in a ticket, but in a full-scale search incident to arrest, whether he is arrested or not.

In Texas a resident may be arrested for a myriad of moving, non-moving and equipment violations hardly rising to the level of breaches of the peace. *See* Tex. Transp. Code Ann. Subtitle C (Vernon 1999) (the "Rules of the Road"). The way the law stands right now, in Texas (as in many other states) a police officer may, in his discretion, arrest a driver when he sees the driver commit a traffic violation (with the exception of speeding). *See* Tex. Transp. Code Ann. § 543.001(Vernon 1999) ("Any peace officer may arrest without warrant a person found committing a violation of this subtitle."); Tex. Transp. Code Ann. § 543.004(a)(1) (Vernon 1999) (must ticket for speeding). Because he instantly has probable cause to arrest upon witnessing the traffic violation, the police officer may immediately conduct a full search incident to arrest rather than having to adhere to the more restrictive requirements of *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. Time and time again, we are seeing people stopped for traffic offenses, but prosecuted on evidence

recovered during such a search. Also coming to light are the many instances where the police conduct such a search, find nothing, and let the driver go. This is most frequently affecting minority drivers.

Under the dictates of *Whren v. United States*, 517 U.S. 806 (1996), we cannot even question the police officer about his actual motives in conducting the stop, but the increasingly available information suggests that these abuses are actually occurring. The position of the Texas Criminal Defense Lawyers Association is that custodial arrest for minor traffic violations is an unreasonable seizure under the Fourth and Fourteenth Amendments. The purpose of this Brief is to demonstrate the abuses attendant with the fact that, because an officer may arrest for virtually any traffic offense, he has automatic probable cause to arrest in virtually any traffic stop from the very time he sees the infraction. These abuses come mainly in the form of "pre-arrest searches incident to arrest," which have become sanctioned under this Court's more recent precedent.

A. The Changing Basis of the Search Incident to Arrest.

In the past, this Court has always impliedly, if not expressly, tied the power to conduct a search incident to arrest to the fact that a person is arrested. For instance, in *United States v. Robinson*, 414 U.S. 218 (1973), the defendant was actually arrested for operating his car without a license. *See id.* at 220. The issue in that case was whether the police officer could then conduct a search incident to the arrest. *See id.* at 235. The Court held that the officer

could. *See id.* In setting out the law, the Court stated as follows:

> It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the person of the arrestee *by virtue of the lawful arrest*. The second is that a search may be made of the area within the control of the arrestee.

Id. at 224 (emphasis added).

Decided the same day as *Robinson* was *Gustafson v. Florida*, 414 U.S. 260 (1973), also a case in which the defendant was arrested for driving without a license and searched. *See id.* at 262. The Court again expressed its reasoning justifying a search incident to arrest in terms likewise suggesting that it was the fact of the arrest that gives rise to the power to conduct a search incident to that arrest:

> We hold, therefore, that upon arresting petitioner for the offense of driving his automobile without possession of a valid operator's license, *and taking him into custody*, [the officer] was entitled to make a full search of petitioner's person incident to that lawful arrest. *Since it is the fact of custodial arrest which gives rise to the authority to search*, it is of no moment that [the officer] did not indicate any subjective fear of the petitioner or that he did not himself suspect that the petitioner was armed.

Id. at 266 (emphasis added); *see also New York v. Belton*, 453 U.S. 454, 460-63 (1981) (search took place after the arrest).

With the 1980 decision of *Rawlings v. Kentucky*, 448 U.S. 98 (1980), however, the power to conduct a search incident to arrest became tied not to the fact of the arrest itself, but to the *presence of probable cause to arrest*. The genesis of this evolution was the following language in *Rawlings*:

> Once petitioner admitted ownership of the sizable quantity of drugs found in [her companion's] purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.

Id., 448 U.S. at 111. Even though this language still contemplates a "formal arrest" actually taking place, it expressly dispensed with any kind of requirement that the arrest happen before the search incident to that arrest. This language has been universally taken to heart by the lower courts.

Since *Rawlings*, the pre-arrest search incident to arrest has further evolved into two general types: (1) Those where the initial probable cause to arrest (that justifying the search) is the reason for both the search and the ultimate arrest; and (2) those where the person's actual arrest and subsequent prosecution are based not upon the reason for the initial probable cause, but upon evidence found during the search.

One example of the first category is *United States v. Tavolacci*, 704 F.Supp. 246 (D.D.C. 1988). *Tavolacci* is a drug courier case. *See id.* at 247-48. The defendant, a passenger on a train, fit certain aspects of a drug courier profile and thereby got the attention of the authorities. *See id.* During his trip, some law enforcement officers questioned him and asked him if they could search or have a dog sniff his suitcase. *See id.* at 248. He declined, but was detained anyway while the agents waited for a dog. *See id.* At one point while he waited, he attempted to bribe one of the agents with cocaine. *See id.* Ultimately, a dog did sniff his suitcase, but did not alert. *See id.* at 248-49. Nonetheless, one agent, without defendant's consent, opened the suitcase, at which time the dog alerted and the agents found cocaine. *See id.* at 249. Defendant was then arrested for possession of cocaine. *See id.* The court held that the search of the suitcase was a valid search incident to arrest because there existed probable cause to arrest the defendant for possession of cocaine at the point he made his admission to the agent. *See id.* at 248, 251; *see also United States v. Donaldson*, 793 F.2d 498, 502-03 (2nd Cir. 1986) (probable cause to arrest which supported pre-arrest search of defendant's apartment was based on defendant giving a conflicting story about a fugitive's whereabouts, after fugitive found in his apartment, defendant arrested and prosecuted for harboring a fugitive); *United States v. Thornton*, 733 F.2d 121, 128 n.9 (D.D.C. 1984) (probable cause to arrest which supported pre-arrest search was based on defendant, during a drug raid at apartment complex and after somebody yelled, "Police," shoving something that looked like drugs into his back pocket,

defendant searched, arrested and prosecuted for possession of drugs); *United States v. Jaramillo*, 714 F.Supp. 323, 332-33 (N.D. Ill. 1989) (probable cause to arrest which supported pre-arrest search was based on defendant fitting drug courier profile and bulkiness around defendant's waist, defendant arrested and prosecuted for possession of drugs); *United States v. Pace*, 709 F.Supp. 948, 956-57 (C.D. Cal. 1989) (probable cause to arrest which supported pre-arrest search was based on officer feeling two kilo bricks of cocaine strapped to defendant's back during a consensual pat-down search of outer garments, defendant arrested and prosecuted for possession of drugs).

Cases falling into the second category, on the other hand, are cases where the pre-arrest search incident to arrest is supported by probable cause to arrest on one basis, but the arrest is made after the "pre-arrest search incident to arrest" turns up something else, usually some kind of contraband. This has come to be most commonly seen where the probable cause to arrest is based on some traffic offense, but the ultimate arrest (after a search) is based on contraband that was found during the search.

A good example in this category is the recent case of *United States v. Lugo*, 170 F.3d 996 (10th Cir. 1999). In this case, the defendant was stopped by a police officer for speeding. *See id.* at 1000. Once stopped, the officer learned that the defendant had no driver's license. *See id.* In Utah (as in Texas) a person can be arrested for driving without a license. *See id.* at 1003. The officer asked defendant to exit the car and patted him down for weapons. He then did a complete search of the passenger compartment of the car, finding cocaine in a secret compartment under

the carpet in the back seat area. *See id.* The defendant was then arrested for possession of a controlled substance. *See id.*

In analyzing the legality of the search, which most definitely took place prior to the arrest, the Tenth Circuit Court of Appeals set out a framework very reminiscent of *Rawlings*: "A warrantless search incident to arrest is valid so long as (1) there existed a legitimate basis for the arrest before the search; and (2) the arrest took place shortly after the search." *Id.* at 1003 (citing *United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998)); *see also Rawlings*, 448 U.S. at 111. The court went on to apply the first prong of this analysis, observing, "Here, the officer observed that [the defendant] was speeding and operating a vehicle without a valid driver's license. Under Utah law, these offenses are class C misdemeanors, and the officer had the authority to lawfully arrest [the defendant] for committing these offenses. Thus, probable cause and a legitimate basis to arrest [the defendant] existed." *Id.* (citations omitted).

The reported case law in Texas is dotted with similar examples. For instance, in *Williams v. State*, 726 S.W.2d 99, 99-101 (Tex. Crim. App. 1986), the defendant was arrested and prosecuted for unlawfully carrying a weapon. A police officer witnessed the defendant in his truck, which was parked on the wrong side of the road. With the intention of investigating for drugs, he walked up to the defendant's truck. Once at the truck, the officer saw a paper bag on the floorboard of the truck. *See id.* at 100. He reached down, seized the bag and opened it, finding two pistols. The defendant was then arrested for the pistols. The Court of Criminal Appeals held that the search was a

valid search incident to arrest because the officer could have arrested the defendant for parking on the wrong side of the road. *See id.* at 101.

The defendant in *State v. McCall*, 929 S.W.2d 601 (Tex. App. – San Antonio 1996, no pet.) was also arrested and prosecuted for unlawfully carrying a weapon. *See id.* at 602. He was stopped in his car for failure to have a license plate light, which, under Texas law, also gave the officer probable cause to arrest, if he chose to do so. *See id.*; *see also* Tex. Transp. Code Ann. §§ 547.322(f), 542.301(a), 543.001 (Vernon 1999) (rear license plate must be illuminated; failure to comply is an offense; general authorization to arrest). He searched the car and found weapons, and thereafter arrested the defendant for possession of those weapons. *See McCall*, 929 S.W.2d at 602.

B. The Abuses Resulting from this Evolution in the Law Serve to Demonstrate That an Arrest for a Minor Traffic Violation Is "Unreasonable" Under the Fourth Amendment.

These are the cases, however, where the police actually *found* something in their search. The abuses inherent in this practice are demonstrated in the instances where the officers stop a driver for a traffic offense, conduct a search, find nothing, and let the driver go. The most grievous abuse is not where the police officer follows a hunch that proves right, but when he follows a hunch that proves to be wrong. Technically, the search incident to arrest would then have been illegal because the "formal arrest" did not "follow[ ] quickly on the heels of the . . . search," *Rawlings*, 448 U.S. at 111, but it would be

up to the driver to tell somebody. These abuses are visited most often on minorities. *See* David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways* (June 1999) at 18-24, available at www.aclu.org/profiling/report (extensive treatment of statistics from a number of different cities showing the number of total traffic stops versus the number of those stops that involve minorities). Victims of this type of police abuse tend to not often tell their stories. As two authors recently observed, "[A]n illegally searched innocent minority member is less likely to have the resources to mount a lawsuit to expose inadequate internal investigation procedures than a white yuppie." William H. Buckman & John Lambreth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, The Champion, Sept./Oct. 1999, at 14.

Shifting the focus from the fact of the arrest to the mere presence of probable cause to arrest on any ground has in a great number of cases turned the search incident to arrest into an instrument of oppression. *See generally* Harris, *supra*, at 9-18 (detailing several specific accounts where persons' cars were searched, and sometimes even dismantled, after being pulled over by the police for traffic violations but where ultimately no arrest occurred). The way the law stands right now, if a police officer decides that he just wants to check to see if a particular driver happens to have any drugs on him, he pulls in behind him in traffic and waits. Eventually, the driver will fail to use a turn signal to indicate a lane change or commit some other minor traffic violation. At that point, the police officer has probable cause not only

to stop, but to arrest. He pulls the driver over and immediately conducts a full-scale search incident to arrest. Finding drugs, he arrests the driver on a drug charge. Not only is this scenario not prohibited by this Court's pronouncements, it is positively sanctioned by them. *See Whren v. United States*, 517 U.S. 806, 813 (1996); *New York v. Belton*, 453 U.S. 454, 460-63 (1981); *Rawlings v. Kentucky*, 448 U.S. 98, 110-11 (1980). In light of *Whren*, an officer cannot even be questioned about his motivation for the stop. *See id.*, 517 U.S. at 813. All that matters is the existence of probable cause to arrest, which, as it happens, is automatically present at virtually every traffic stop that is made anywhere by reason of an arcane collection of traffic regulations.

This Court stated in *Sibron v. New York*, 392 U.S. 40, 63 (1968), "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification." This axiom has been reaffirmed in later cases, *see, e.g., Smith v. Ohio*, 494 U.S. 541, 541-43 (1990), and was even stated in *Rawlings* itself. *See id.*, 448 U.S.at 111 n.6. We have begun, however, to see case after case in which officers stop a driver for a traffic offense, conduct a search, and arrest the driver for what they find. This turns the *Sibron* "axiom" into nothing more than a legal fiction.

David Harris recounts an incident in his article on racial profiling where Nelson Walker, a black college student, was stopped in North Carolina in 1998 for not wearing a seatbelt:

> The officers detained him and his two passengers for two hours as they searched for illegal drugs, weapons, or other contraband.

> Finding nothing in the car, they proceeded to dismantle the car and removed part of a door panel, a seat panel and part of the sunroof. The officers found nothing and in the end handed Walker a screwdriver, saying, "You're going to need this," as they left the scene.

Harris, *supra*, at 13. Even more stunning than the level of abuse Mr. Walker suffered at the hands of those officers is the fact that if the search had turned up just one marijuana cigarette, everything those officers did on that day would not only have been vindicated, but not even subject to question!

C. Traffic Stops Should Be Subject to the Same Reasonable Suspicion and Probable Cause Standards as All Other Police/Citizen Encounters.

The fact that a police officer may arrest for a traffic offense has created a shortcut around the Fourth Amendment and the requirements this Court has otherwise set for police-citizen encounters, searches and arrests. *See Michigan v. Long*, 463 U.S. 1032, 1049-50, 1049 n.14 (1983) (setting out the limits of a search under *Terry v. Ohio*, 392 U.S. 1 (1968) as they apply to automobiles and drawing a distinction between a *Terry* search and a search incident to arrest). So long as a law is on the books allowing police officers the discretion to arrest drivers for minor traffic offenses, there will always be probable cause to arrest and therefore always be an automatic basis for a search. *See Whren*, 517 U.S. at 813 (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)). What has happened is that the rules enunciated in *Terry* have been abrogated in perhaps the vast majority of vehicle stops. While a search incident

to arrest is supported by a governmental interest in preserving evidence, such a search cannot be legitimately supported by an interest in blindly searching for evidence of any type. *See Long*, 463 U.S. at 1049 n.14; *Chimel v. California*, 395 U.S. 752, 762-63 (1969). There is no societal need, nor a reasonable law enforcement need, that is met by denying a citizen the protections of *Terry* just because he is driving his car rather than walking down the street. To think that evidence of a traffic offense might be concealed in the driver's car, or that the driver could actually destroy such evidence, is patently ridiculous in any event. The more rational approach would be to re-apply the traditional standards of reasonable suspicion and probable cause to traffic stops.

This Court should recognize that it is unreasonable under the Fourth and Fourteenth Amendments for a police officer to have the power to affect a custodial arrest for minor traffic violations – especially where the decision to arrest is left to that officer's discretion – unless those violations amount to a breach of the peace. Where a police officer observes a traffic offense, he *should* have probable cause to stop and give a citation. If, during that stop, additional reasonable suspicion or probable cause develops, he may investigate further as appropriate under the established standards. *See Long*, 463 U.S. at 1049-50; *Florida v. Royer*, 460 U.S. 491, 497-501 (1983); *Michigan v. Summers*, 452 U.S. 692, 699 (1981); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975); *Adams*

v. Williams, 407 U.S. 143, 145-49 (1972); *Terry v. Ohio*, 392 U.S. at 21-22, 27. So long as he can justify his actions under the *Terry* standard, his subjective intentions still would not matter. Otherwise, he should not be given carte blanche to conduct an invasive, full-blown search incident to arrest, before an arrest is affected, on a minor traffic offense for which he would in all likelihood issue a ticket. That he can presently do so only serves to further highlight the fact that custodial arrests for minor traffic violations which are not breaches of the peace are unreasonable seizures under the Fourth and Fourteenth Amendments.

PRAYER

For these reasons, *amicus* prays that this Court will grant review in the above cause to examine this important issue.

Dated: March 20, 2000
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Respectfully submitted,

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